

Specifically, Applicants presented claims 18-23 of the present application as claims 18-23 of the application that matured into U.S. Patent No. 6,739,733 (the '733 patent). In the application for the '733 patent, the Examiner made a restriction requirement, and Applicants did not elect the group of claims containing claim 18-23. Rather, Applicants filed the present divisional application with claims 18-23. Now, however, the Examiner has changed her position and stated that claims 18-23 are each an obvious variation of the claims of the application for the '733 patent from which she restricted them.

35 U.S.C. § 121 states:


If two or more independent and distinct inventions are claimed in one application, the Director may require the application to be restricted to one of the inventions. If the other invention is made the subject of a divisional application which complies with the requirements of section 120 of this title it shall be entitled to the benefit of the filing date of the original application. A patent issuing on an application with respect to which a requirement for restriction under this section has been made, or on an application filed as a result of such a requirement, shall not be used as a reference either in the Patent and Trademark Office or in the courts against a divisional application or against the original application or any patent issued on either of them, if the divisional application is filed before the issuance of the patent on the other application. If a divisional application is directed solely to subject matter described and claimed in the original application as filed, the Director may dispense with signing and execution by the inventor. The validity of a patent shall not be questioned for failure of the Director to require the application to be restricted to one invention. (emphasis added)

MPEP § 804.01 interprets 35 U.S.C. § 121 and states "The third sentence of 35 U.S.C. 121 prohibits the use of a patent issuing on an application with respect to which a requirement for restriction has been made, or on an application filed as a result of such a requirement, as a reference against any divisional application, if the divisional application is filed before the issuance of the patent."

Therefore, since the present application was filed before issuance of the '733 patent, the '733 patent cannot be used as a basis for an obviousness type double patenting rejection.

Based on the foregoing, the allowance of claims 18-23 is respectfully requested. If for any reason the Examiner is unable to allow the application on the next Office Action, the Examiner is requested to contact the undersigned attorney for the purpose of arranging an interview.

Respectfully submitted,



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